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No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FINANCIAL INFORMATION, INC.

Petitioner,

—against—

MOODY'S INVESTORS SERVICE, INC.

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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68 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Financial Information, Inc.'s ("FII") petition lists three questions for review. Each of FII's questions contains statements or assumptions which, as the record and the opinions below substantiate, simply do not reflect what occurred at trial or on appeal. Since the questions presented by FII are repetitious and argumentative, Moody's Investors

Service, Inc.[1] ("Moody's"), pursuant to Rule 34.2 of the Supreme Court Rules, restates the question presented as follows:

1. Whether the District Court's factual determination that FII's Daily Bond Cards -- consisting of five basic and functional facts about municipal bonds on a 4-inch by 6-inch index card

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[1]/Statement pursuant to Rule 28.1. The parent company of respondent Moody's is The Dun & Bradstreet Corporation, which has the following non-wholly-owned subsidiaries: Thomson Directories (Partnership); SITA, Societa per gli Indici Tessile e Abbigliamento-S.r.l.; Norges Markedsdata A/S; Interpanel A.G.; D & B Computing Services (France) S.A.; Dun & Bradstreet S.L.; A.C. Nielsen de Colombia S.A.; Teollisuuden Tielopalvelu Industrial Intelligence Ltd. Oy; Finnpanel Oy; Kululustutkimus Oy Marketing Radar Ltd.; AB Marketing Bo Jonsson; ABM Farmstat AB; and Panel de Gestion.

-- did not embody sufficient selectivity, coordination or arrangement to be copyrightable was clearly erroneous.

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BRIEF OF RESPONDENT MOODY'S INVESTORS SERVICE, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Moody's respectfully requests that FII's petition for a writ of certiorari be denied. Moody's submits that the opinion of the United States

Court of Appeals for the Second Circuit is fully supported by the evidence at trial and is fully consistent with the Copyright Act of 1976 and the cases interpreting it. Moody's further submits that this case turns entirely on narrow factual issues unique to this dispute, in which the trial court's determination of the lack of credibility of an FII witness played a significant role. Accordingly, Moody's respectfully asserts that this case is ill-suited for review by this Court.[2]

2/Pursuant to Rule 34.2, the items setting forth the Opinions Below, the Basis of Jurisdiction, and the Constitutional and Statutory Provisions involved have been omitted.

COUNTER-STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

FII's petition for certiorari scarcely mentions the item for which FII is claiming copyright protection. This studious omission is not surprising inasmuch as the so-called "work" is nothing more than a 4-inch by 6-inch index card containing the five bare bones facts about a given municipal bond: the name of the issuer and type of bond (e.g., water, sewage, etc.); the redemption date; the redemption agent; the identification of the specific bonds being called; and the redemption price. A copy of the set form which is used for each FII card is reproduced as Exhibit A to

this brief. The Second Circuit correctly called these cards -- and the procedure for collecting the five public domain facts they contain -- "rudimentary." (A-5.)[3] As the District Court and two separate panels of the Second Circuit have recognized, FII is actually claiming protection not for a copyrightable "compilation,"

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[3]/This brief cites the three decisions below in this case and adopts the abbreviations set forth in plaintiff's petition. References to the Second Circuit's first opinion, Financial Information, Inc. v. Moody's Investors Service, 751 F.2d 501 (2d Cir. 1984), are designated "C" followed by a page number. References to the District Court's opinion on remand, 231 U.S.P.Q. 803 (S.D.N.Y. 1986), are designated with a "B." References to the Second Circuits's opinion, 808 F.2d 204, unanimously affirming the District Court's opinion are designated with an "A."

but rather for the basic facts that it has copied from certain newspaper advertisements. (A-8, B-13--4, C-4--5.)

This is, in short, a fact-specific case that has virtually no implications with respect to the copyrightability of any other "work." Furthermore, this is a case wherein the District Court's assessment of the credibility of an FII witness plays an important role. The description of the alleged "selectivity, coordination or arrangement" recited in plaintiff's petition is drawn exclusively from the testimony of Frances Zawilski, an FII assistant editor who testified at the trial on remand. But the District

Court found Ms. Zawilski's testimony to be unworthy of belief, calling it "an attempt to enlarge and embellish a straight forward, simple but time consuming operation." (B-5--6.) The District Court and the Court of Appeals also noted that her testimony conflicted sharply with that of FII's managing editor, who was Ms. Zawilski's supervisor, and with that of a former FII researcher. (A-5--6; B-9.) For these reasons and for the reasons set forth hereinafter, defendant respectfully submits that this is not a case that warrants review by the Supreme Court of the United States.

B. PROCEDURAL BACKGROUND

On December 22, 1986, the United States Court of Appeals for the Second Circuit unanimously affirmed a judgment entered after a non-jury trial on remand before District Judge Robert L. Carter dismissing the complaint in this action which sought damages for copyright infringement and unfair competition.

In the initial trial, the District Court found that Moody's minimal use of material drawn from FII's service in its Municipal and Government News Reports ("News Reports") constituted a "fair use." The Second Circuit, on the record before it at the time, did not agree that Moody's had carried its burden of

establishing a fair use and remanded for further inquiry. At the same time, the Second Circuit expressed strong doubts that the index cards were copyrightable at all. (C-4, C-44.) The Second Circuit had directed the District Court to consider further whether plaintiff's daily bond cards, which, according to the Court of Appeals, involved "apparently little, if any skill or creative discretion" in their making, qualified as an "original work of authorship" entitled to copyright protection. (C-4--5, C-25--28.)

On remand, Judge Carter took additional testimony on the preparation of the cards and made

extensive factual findings on the degree to which FII engaged in "selection, coordination or arrangement," the statutory standard for copyrightability of a compilation. Based on his evaluation of conflicting evidence and, in particular, his assessment of the credibility of FII's only witness at the remand trial, Judge Carter held that "the modicum of selectivity, coordination or arrangement required ... to qualify for copyright protection is simply not present. There is no coordination or arrangement of the data except to codify it into a uniform mold." (B-15.) In addition, Judge Carter held that

FII's state law claims were preempted (B-20).

On appeal for the second time, the Second Circuit held that Judge Carter's conclusion was "amply supported by the record and certainly not clearly erroneous." (A-8.) Thus, two separate panels of the Second Circuit have considered this case and both doubted that an FII index card is a copyrightable compilation.

C. STATEMENT OF FACTS CONCERNING COPYRIGHTABILITY

FII's Bond Cards contain bare bones information about the redemption of bonds issued by all domestic municipalities. (A-5.) Printed on 4-inch by 6-inch index cards, the

Daily Bond Cards simply report the redemption price, date and agent for a bond which has been called for redemption. (A-5.) Packets of these cards are mailed to subscribers daily and often entirely omit the redemption information from the card and, instead, include photocopies of actual printed notices from issuers of the bonds.[4] (A-5.)

The District Court concluded that FII's employees perform no more than "a simple clerical task" in preparing the cards at issue. (B-13.) As the

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4/The individual daily cards are not registered with the Copyright Office. Plaintiff sought to register the cards as a single group registration, but the Copyright Office refused to issue a single registration for the cards.

Second Circuit held, this finding is amply supported by testimony from FII's own witnesses. (A-8.)

At trial on remand, plaintiff called only one witness, Frances Zawilski, an FII editor who had not testified at the first trial. On direct examination, plaintiff's attorney blatantly attempted to have Ms. Zawilski "tailor" her testimony in an attempt to claim that FII exercised some element of subjective judgment in preparing the cards. (B--4, 6, 8--9, and 13.) However, Ms. Zawilski could not, without the aid of notes prepared in her lawyer's office the evening before the hearing, testify to any facts along those lines. Not

surprisingly, Judge Carter found much of her testimony on direct examination to be unworthy of belief. (See infra Point II.) Yet, ironically, Ms. Zawilski's testimony on cross-examination established that the process engaged in by FII entails no "selectivity, coordination, or arrangement" whatsoever.

For example, Ms. Zawilski testified as follows:

> Mr. Callagy (counsel for Moody's): Now directing your attention to that tombstone (Ex. U), does that contain the name of the bond issuer?
>
> Ms. Zawilski: Yes, it does.
>
> Q: And what is the name that is specified on the tombstone?
>
> A: Jefferson County, Colorado.
>
> Q: . . . what is the name that appears for the issuer on your card?
>
> A: Jefferson County, Colorado.
>
> Q: Now go back to the tombstone, or source document. Does that give a description of the bond?

A: . . . Yes, it does give a description of the bond.

Q: And does that same description appear on the FII card?

A: Yes, it does.

Q: And does the tombstone, or source information, also contain the fact that the bond will be called on a given date?

A: Yes, it does.

Q: Does that same information appear on the card?

A: Yes, it does.

Q: Does the tombstone set forth a price at which the bond will be called?

A: Yes, it does.

Q: And is that same price, does that appear on the card?

A: Yes, it does.

Q: And does the tombstone also contain . . . the name of the redemption agent?

A: Yes, it does.

Q: And does the card contain the name of the redemption agent?

A: Yes, it does, and the address.

Q: By the way, why does the tombstone include the name of the redemption agent?

A: For precisely the same reason we do. It is necessary for the bondholder to know where to send the bond for payment.

Q: And why does the tombstone include the price?

A: To make it, the information, available to the broker about what he can expect in return when he surrenders the bond for payment.

Q: And why does FII include the price on there?

A: For the same reason.

Q: And does the tombstone include the date of the call?

A: Yes, it does.

Q: And why do they include the date of the call?

A: So that the broker will know that is the date on which the bond will cease to bear interest and must be surrendered for payment or they will be losing money.

Q: And why will he be losing money?

A: The bond will no longer be collecting interest. ...

Q: And why do you include the date of the call?

A: For the same reason.

Q: Why is there a description of the bond on the tombstone?

A: So that the broker will be able to identify the issue being called.

Q: And is that the same reason why FII includes that information?

A: Yes, it is.

Q: . . . -- you've already told us there is a name of [an] issuer on the tombstone.

A: Correct.

Q: Why is there a name of [an] issuer on your card?

A: For the same reason: identification.

In other words, FII's researchers did nothing but copy five facts from the tombstone advertisement onto an index card. (A-5; B-12--14.) The facts copied are always the same and they are absolutely dictated by the function that the cards perform. (B-12.)

This testimony confirmed the facts established at the first trial by the testimony of FII's Managing Editor.

Mr. Callagy (counsel for Moody's): Now, with respect to the cards that you prepared, the little three by five index cards, can you tell me how the editor goes about preparing the cards? Is there a set form that they fill the information in on?

Mr. Sheekey: We have a set form which only lists the redemption date, redemption price and redemption agent.

Q: All the editor does is fill in the date on the card?

A: No.

Q: Well, the date is put down on the card?

A: The redemption date?

Q: Yes?

A: Yes.

Q: And the price?

A: That's right.

Q: And the redemption agent?

A: That's right.

Q: And the bond numbers?

A: That's right.

And further:

Q: Is there a decision made or is that [redemption] price [listed on the FII card] set forth in the source?

A: Excuse me, the decision is the wrong word. We check through the notice to find the redemption price, and, of course, the redemption agent, and if there is -- excuse me -- a

redemption date and then if there is a redemption agent.

Q: But the redemption date is usually set out in the source?

A: Yes, some part of the notice.

Q: And the date, so there is no analysis that is required. It is simply a question of transposing these few facts onto your card. Isn't that correct?

A: With some degree of speed and accuracy as well.

Q: But you answer my question yes [don't] you?

A: Yes.

(emphasis added). Thus Ms. Zawilski and Mr. Sheekey both confirmed on cross-examination that FII's employees are engaged in the simple clerical task of skimming the tombstones and copying the five basic facts. The elaborate description of this process, advanced by FII's counsel in its petition for certiorari at page 23, is

in fact nothing more than a account of the acts of reading and copying.

As conceded by the FII employees who testified at the original trial and on remand, a daily card contains public domain facts essential to notify a bondholder that his bond has been called for redemption and nothing more. (B-9--13.) The facts are dictated by the function of the cards. (B-14.) FII exercises no selectivity as to which facts are included. (A-6--8.) First, the bond itself must be identified with the name of the issuing authority and a description of the bond, i.e., water, sewage, etc. Second, the information pertinent to redemption is provided: the date of

the redemption, the agent handling the redemption, the redemption price, and the identification of the bonds called. (B-11--12.) According to plaintiff's own witnesses, none of this information is "made up" by FII "invented" by FII, "created" by FII, or the product of any analysis of raw data by FII. Rather, every card contains the five facts which are simply lifted by FII from a source document, typically an official redemption notice or "tombstone." (A-5.)

In describing the method by which FII prepares its daily cards, FII's Managing Editor testified that an FII employee simply fills in a "set form"

(Exhibit A to this brief) to be sent to the printer with the description of the bond and the redemption agent, date, price, and the bond numbers, where necessary, by transcribing those facts from the original source onto the form. This procedure was confirmed by plaintiff's testimony on remand. FII's employees exercise so little effort in creating the cards that where the bonds described are too numerous to be transcribed accurately, FII, at least four times a week, attaches photocopies of tombstones to the card and supplies them to FII's customer. (B-6.)

As the Court can see, the "set form" (Exhibit A) is simply a 4-inch x

6-inch index card with blanks for the five facts. The use of the set form means that every daily bond card published by FII contains the same five facts. These factual elements are dictated by the function of the cards which, in FII's own words, is to present in "outline form," the facts a bondholder must know in order to redeem his bond. As FII promotional literature states: "SUPERFLUOUS MATTER (total amount called, references to indentures, etc.)" (emphasis in original) is not included because it is indeed superfluous to the specific function of the cards. As plaintiff conceded, information not included on

a card is "not critical" to its subscribers.

Moody's called Theresa Moore as a witness at the remand trial. Ms. Moore is a former employee of FII who had served as the researcher for the daily bond cards in 1980 and 1981, the only years at issue in this case. This witness confirmed that no "subjective analysis" was utilized in preparing the cards. "I just took the information from what I saw in the tombstones and the articles in the paper," Ms. Moore testified.

D. CERTAIN FACTUAL MISSTATEMENTS AND OMISSIONS IN FII'S PETITION

FII's petition is replete with factual misstatements of the record below. In particular, FII repeatedly

refers to "wholesale appropriation" by Moody's, but there has never been a finding that Moody's engaged in extensive copying. (A-7 n.1) Indeed, Moody's proved that it could not possibly have copied the majority of called bond entries because of publication schedules. On remand, Moody's was prepared to introduce a statistician's analysis of the number of entries Moody's could not have copied from FII's cards in 1980 and 1981. This analysis confirmed the testimony of Moody's witnesses at the original trial that an FII card was used as the source for a Moody's entry approximately 2 percent of the time. However, the District Court declined

to consider this evidence, limiting additional fact-finding to the issues of copyrightability, preemption, and damages.

In its petition, FII also neglects to mention that it knew for many years that Moody's used FII's daily bond cards as a source of information about the bond redemption notices yet FII never objected. (B-23--24.) For example, a Moody's employee testified that in 1979 he telephoned FII approximately ten times to obtain bond redemption information. When making these calls, the witness identified himself as a Moody's employee and requested clarification of data he had gathered from an FII

card. Because FII responded so willingly to Moody's inquiries, Moody's had no reason to believe that FII found its use of the daily bond cards in any way objectionable.

Also significant by way of background is FII's own reliance, in turn, on the Moody's News Reports, as well as many of Moody's other publications, in the preparation of its various services, including the Daily Bond Cards. (B-23--24.)

Indeed, FII relied on Moody's more than any other single source because of Moody's comprehensive coverage and the accuracy of its publication. Ms. Moore testified that she used Moody's at least four hours a

week in carrying out her research for the FII bond cards, reading each issue of the M&G Supplement from cover to cover. Ms. Moore also testified that in a typical scenario, FII would use Moody's to find out about bond redemptions it could not otherwise learn of. In summary, the facts adduced at trial confirmed not only that FII's cards are not copyrightable but also that Moody's acted fairly and openly at all times in connection with its minimal use of the public domain facts contained in FII's cards.

REASONS FOR NOT GRANTING CERTIORARI

POINT I

THE DISTRICT COURT'S OPINION THAT FII'S CARDS ARE NOT COPYRIGHTABLE COMPILATIONS IS AMPLY SUPPORTED BY THE EVIDENCE

Rule 52(a) of the Federal Rules of Civil Procedure mandates that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Whether or not FII's cards are copyrightable is a question of fact and the Second Circuit was therefore required to accord great deference to the findings of the District Court on this issue. See Original Appalachian Artworks, Inc. v.

Toy Loft, Inc., 684 F.2d 821, 824-25 (11th Cir. 1982) (whether there was sufficient "originality" to accord copyright protection was question of fact); Dezendorf v. Twentieth Century Fox Film Corp., 99 F.2d 850, 851 (9th Cir. 1938) (same). Moreover, it is well-settled that the reviewing court may not set aside a factual finding merely because it would have viewed the facts differently or given greater weight to certain evidence than the trial court gave. See, e.g., Inwood Laboratories, Inc. v. Ives Laboratories Inc., 456 U.S. 844, (1982); United States v. National Association of Real Estate Boards, 339 U.S. 485, 495-96 (1950). The Second

Circuit found that the District Court's opinion was amply supported by the evidence and was by no means "clearly erroneous." (A-8.) The applicability of the "clearly erroneous" standard of review makes this case particularly unsuitable for a grant of certiorari.

A. THE DAILY BOND CARDS ARE NOT "COMPILATIONS" UNDER THE 1976 COPYRIGHT ACT AND ARE THUS NOT SUSCEPTIBLE TO COPYRIGHT PROTECTION

It is axiomatic that "facts" or "ideas" are not subject to copyright protection. See Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2224 (1985); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310

(2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967). However, a compilation of such facts is susceptible to copyright protection if the compilation qualifies as "work formed by the collection and assembly of data that is selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1982); accord Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984). However, as the evidence at trial established, the cards issued by FII do not exhibit "the modicum of selectivity, coordination or arrangement required . . . for copyright protection." (B-15.)

As Judge Wyzanski explained in Triangle Publications, Inc. v. New England Newspaper Publishing Co., 46 F. Supp. 198, 201 (D. Mass. 1942):

> To constitute a copyrightable compilation, a compendium must ordinarily result from the labor of assembling, connecting and categorizing disparate facts which in nature occurred in isolation. A compilation, in short, is a synthesis. It is rare indeed that an analysis of any one actual occurrence could be regarded as compilation. For an account of a single event to be subject to copyright, it must have individuality of expression or must reflect peculiar skill and judgment.

Thus, a telephone directory might be validly copyrighted (although the cases are not entirely consistent on that point). But an index card containing three facts (the name,

address and number of a telephone owner) would not be a copyrightable compilation. That is precisely the sort of minimalist "work" for which FII is claiming protection.

Faced with the uncontroverted evidence that each card in this case contains the same five basic facts, which are merely transcribed from an official source onto FII's set form (Exhibit A hereto), plaintiff attempts in its petition to obfuscate the simplicity of its procedure. FII distorts the evidence to create the impression that "selection, coordination or arrangement" occurs with respect to the cards thus claiming each card a protectible

compilation in its own right. In particular, FII asserts that it must "select" which financial information relates to called bonds, rather than some other financial data.[5] This claim is belied by the record. There is no secret about which information relates to redemptions. This information most often appears as paid advertisements -- "tombstones" -- in newspapers and financial journals. In

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5/FII's argument that it exercises selectivity boils down to the notion that, of all the facts in the world, it has selected municipal bond calls to report upon. See FII Petition p. 21 n.5. If this satisfied the statutory standard for "selectivity," every list of facts, no matter how crude or obvious, would be a copyrightable compilation, since it necessarily could not contain all of the facts in the world.

its cards, plaintiff makes no distinction between types of redemption notices, not even distinguishing corporate from municipal bonds, but includes all types of call notices in its daily bond cards. Clearly, as plaintiff's testimony and advertisements establish, FII exercises no selectivity or subjective judgment in determining which redemption notices it will publish; it publishes all of them. Thus, plaintiff testified: "We attempt to cover everything we can." As explained in PIC Design Corp. v. Sterling Precision Corp., 231 F. Supp. 106 (S.D.N.Y. 1964), where the selection of elements is merely

dictated by functional consideration and is therefore not original, the "work" will not be protected by copyright. See also Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541 (2d Cir. 1959).

FII also claims that it omits various facts contained in the source advertisements in creating its cards. But in omitting these various items plaintiff does not exercise any judgment, for the information it must include on its cards is dictated by its "set form," which is, in turn, dictated by the function of the cards to notify bondholders of redemptions.

Finally, FII has claimed that its arrangement of the data on each

index card satisfies the "originality" standard of copyright. But here too the evidence is to the contrary. For example, the fact that FII places the description of the called bond at the top of every index card is surely functional -- it identifies the subject of that card. Indeed, Ms. Zawilski conceded that major banks and brokerage firms use the same type of heading when listing bonds. The remaining three elements, which appear

in mere outline form, are not susceptible of sufficient variation in arrangement or expression so as to make plaintiff's order of price, date and redemption agent protectible. For example, in PIC Design Corp. v. Sterling Precision Corp., supra, 231 F. Supp. at 106, a table of fourteen figures was held not copyrightable because its "arrangement" reflected a "general method" for listing the information. Similarly, in Ricker v. General Electric, 162 F.2d 141 (2d Cir. 1947), plaintiff set forth scientific information on a form intended to be both readable and understandable to the layman. The Second Circuit rejected the notion

that any copying of that format could amount to a claim of copyright infringement.

> And in considering that issue [infringement] it must be remembered that the plaintiff has no monopoly of the scientific information with which her book deals; nor has she a monopoly of the idea of expounding such information in simple language comprehensible by lay readers.

Ricker, 162 F.2d at 142.

Thus, as the District Court concluded and the Second Circuit confirmed, plaintiff has failed to show that it exercises selection, coordination or arrangement sufficient to turn its cards into "original works of authorship" susceptible of copyright protection. (A-8; B-15.) Because of the functional arrangement

of the facts on the cards, plaintiff can make no claim that its particular format for listing those public domain facts is protectible under the copyright law.

6/ FII impermissibly attempts by way of a footnote to raise its claim that state law misappropriation claims have not been preempted by the Copyright Act. See FII Petition p. 18 n.4. Aside from the fact that this issue has not been properly raised in FII's Questions Presented, preemption is clearly mandated on the facts in this case, as the Second Circuit held. (A-10.) See 17 U.S.C. § 301 (1982); Sears, Roebuck Co. v. Stiffel Co., 376 U.S. 225 (1964). The New York Court of Appeals has expressly acknowledged that the Copyright Act preempts misappropriation claims such as plaintiffs'. See Editorial Photocolor Archives, Inc. v. Granger Collection, 61 N.Y.2d 517, 474 N.Y.S.2d 964 (1984); accord Oboler v. Goldin, 714 F.2d 211, 213 (2d Cir. 1983). Nor does FII's claim fall into the "hot news" exception because "FII proved neither the quantity of copying nor the immediacy of distribution" necessary to sustain such a claim.

FII stridently criticizes the Second Circuit for allegedly failing to protect incentives for authors. Actually, as demonstrated by the recent case of Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987), the Second Circuit has been extraordinarily protective of copyright holders. The Second Circuit has upheld the copyrightability of compilations in numerous important decisions. See, e.g., Roy Export Company v. Columbia Broadcasting System, 672 F.2d 1095 (2d Cir.), cert.

(A-11.) In any event, the District Court found that plaintiff could not establish the elements of a state law misappropriation claim even if such a claim had not been preempted. (B-20--23.)

denied, 459 U.S. 826 (1982). In its most recent major opinion on the copyrightability of compilations, Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984), the Second Circuit ruled that a publication listing 18,000 different baseball cards was copyrightable. In Eckes, the Second Circuit had "no doubt that appellants exercised selection, creativity and judgment." Id. at 863. By contrast, in this case, two separate panels of the Second Circuit noted the total absence of "selection, coordination, or arrangement" on the part of FII. The finding that FII's index cards are not copyrightable works is a reflection of the rudimentary nature

of the cards themselves, not a reflection of some bias against copyright holders in the Second Circuit. In fact, plaintiff has pointed to no previous case involving an alleged compilation in which the Second Circuit was under-protective of the copyright holder's rights.

Contrary to FII's contentions, the opinion of the Second Circuit does not conflict in any way with any decision of this Court. To the contrary, the District Court and the Second Circuit have carefully applied the most fundamental principle of copyright law as announced by this Court -- that copyright protects only the expression of facts, not the facts

themselves. See Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2224 (1985); see also H. R. Rep. No. 1476, 94th Cong., 2d Sess. at 56 (1976) ("copyright does not preclude others from using the ideas or information revealed by the author's work").

Furthermore, plaintiff has in effect conceded that there is no meaningful disagreement among the Circuits regarding the theory of affording protection to compilations. See FII Petition p. 27 n.7 ("sweat of brow theory is really [a] red herring"). As FII acknowledges, the Seventh Circuit has recently backed away from its "sweat of the brow"

theory of copyrightability. See Rockford Map Publishers v. Directory Service Co. of Colorado, Inc., 768 F.2d 145 (7th Cir. 1985). There is now a broad consensus of opinion among courts and commentators that only the statutorily required exercise of selection, coordination or arrangement can confer copyrightability upon a compilation.

As Judge Newman suggested in his concurrence in the Second Circuit's first opinion in this case, those few cases suggesting that copyright should be extended solely because of laborious effort tend to be older, disfavored cases. The statutory criteria for protection of

compilations that Congress articulated in 1976 when it enacted the current copyright statute should have made it clear that such cases are no longer good law. These older cases have also been sharply criticized by the commentators. See, e.g., M. Nimmer, Nimmer on Copyright §§ 2.04[B] at 2-42 n.16, 2.11[E], and 3.04 (1986).

The "sweat of the brow" theory demands undue originality from a second author and accords the compiler a virtual monopoly on public domain facts. The theory advanced by FII thus contradicts the most basic principles of the Copyright Act. See generally D. Stimson, Factual Compilations -- Copyright Protection

for Compilation Depends Upon Degree of Originality Involved in Assembling Facts - Financial Information, Inc. v. Moody's Investors Service, Inc., 33 J. Copyright Soc'y 1 (October 1985) (hereinafter "Factual Compilations").

FII relies upon Rockford Map, supra, in arguing that its elemental index cards are copyrightable. However, in contrast to FII, the plaintiff in Rockford Map had engaged in extensive selection, coordination or arrangement of facts. Plaintiff started by adapting an aerial photograph into a basic map; then it translated conveyancers' metes and bounds into pictorial representations superimposed upon the maps. Thus the

activities of Rockford Map Publishers entailed a substantial original contribution to the underlying public domain data, including a complete transformation from one medium to another. FII's activities involved no such original contribution. There is no reason to conclude that the Seventh Circuit applying Rockford Map would conclude that FII's index cards are copyrightable. Indeed, Rockford Map, Eckes, and virtually all of the recent compilation cases can be readily harmonized. Cf. Factual Compilations, supra, at 13--14.

B. THE FINDINGS OF THE DISTRICT COURT DEPENDED IN SIGNIFICANT PART UPON AN ASSESSMENT OF THE LACK OF CREDIBILITY OF AN FII WITNESS

The District Court's determination that FII engaged in little or no selection, coordination, or arrangement was based in large measure on oral testimony, and, as such, that finding can be disturbed only in the most unusual circumstances. As this Court discussed in Anderson v. City of Bessemer City, N.C., 105 S. Ct. 1504, 1512 (1985):

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's

> understanding of and belief in what is said.

Accord Sweeney v. Research Foundation of State University, 711 F.2d 1179, 1185 (2d Cir. 1983) (reviewing court must accord great deference to district court on matters such as assessment of credibility of witnesses and resolution of conflicting permissible inferences); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 293 (2d Cir. 1978) ("an appellate court, equipped only with a 'cold' record, is appropriately reluctant to reject the credibility evaluations of the district court").

In its petition for certiorari, FII bases its claim that it exercised selectivity, coordination, or

arrangement upon certain testimony by Ms. Zawilski. But as the District Court opinion makes clear, Judge Carter simply did not believe Ms. Zawilksi's testimony. For example, Judge Carter notes in his opinion that on remand FII "introduced evidence tailored to the Court of Appeals opinion" (emphasis added). (B-4.) Judge Carter also observed that "the court is now convinced that the testimony on remand was an attempt to enlarge and embellish a straightforward, simple but time consuming operation" (emphasis added). (B-5.) Again at B-6, the District Court noted, "[n]o matter how FII attempts to dress it up, all it does

is provide its subscribers with the requisite bond redemption data in simplified form for easy and ready reference" (emphasis added).

Additional statements in Judge Carter's opinion further underscore that he considered the testimony of FII's sole witness on remand to have been largely fabricated. Thus at B-8--9, he stated that "Frances Zawilski ... gave a far more inflated version of her training process as an FII researcher" and went on to note that "Zawilski's testimony is in sharp contrast to the testimony at the first trial of George Sheekey, FII's managing editor" (B-9 emphasis added). And, yet again, at B-13, Judge Carter

said, "[despite] FII's effort on remand to modify [Sheekey's] testimony in order to show that a process of selection or arrangement took place within the guidelines set by the Court of Appeals, it is clear that FII's researchers perform a simple clerical task" (emphasis added).

In short, basing his opinion explicitly on an assessment of the credibility and demeanor of various witnesses who gave conflicting oral testimony, Judge Carter concluded that FII's witnesses had been relatively candid about the issues of selectivity, coordination, or arrangement at the first trial when FII believed that "sweat of the brow"

was sufficient to confer copyrightability, but that FII's sole witness at the trial on remand had distorted the truth in a vain effort to show that FII had satisfied the statutory requirements for copyrightability.

CONCLUSION

The Second Circuit correctly held that the factual findings of the District Court were amply supported by the evidence. Accordingly, defendant respectfully submits that FII's petition for a writ of certiorari to the Second Circuit should be denied in its entirety.

Dated: New York, New York
June 12, 1987

Respectfully submitted,

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EXHIBIT A

MUNICIPAL REDEMPTION

REDEMPTION PRICE -

REDEMPTION DATE -

REDEMPTION AGENT -

Amount
Numbers of called

MUNICIPAL REDEMPTION